Supreme Court of the United States.

CHARLES C. PENNINGTON,
Plaintiff in Error,

No. 494. *vs.*

THE FOURTH NATIONAL BANK OF CINCINATI, OHIO,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error, as plaintiff, brought suit (petition on page 2 of Record) against the defendant in error, The Fourth National Bank, in the Superior Court of Cincinnati, Ohio, to recover $1,347.54, with interest from September 5, 1908, payment on a check of plaintiff, duly presented, in such amount being refused although he had that amount to his credit on deposit with said bank.

Said bank, by way of answer (Record, page 4), alleged that Clara N. Pennington, on September 4, 1908, brought suit in the Common Pleas Court of Hamilton County, against said Charles C. Pennington for divorce,

alimony, custody of children and an injunction, and she made the said bank a party defendant. On September 4, 1908, the bank was served with summons together with an order restraining it from paying out any money which it held belonging to Charles C. Pennington. From time to time during the divorce suit, the bank, by order of said Common Pleas Court, paid from the money it held belonging to Charles C. Pennington, the sum of $550. During the January Term, 1909, a final decree was entered in said case ordering that Charles C. Pennington be forever divested of all and every claim, title or interest to the sum of $1,445.17 held by the bank for him at the commencement of said divorce suit, and that the bank pay the balance of said money to his wife, Clara M. Pennington, or to Eugene C. Pociey, her attorney, on account of alimony and attorney's fees. The bank paid out the balance of said money in accordance with said decree.

Said Charles C. Pennington, by way of amended reply to said answer (see Record, page 5) admitted said proceedings were had, but complained that the alleged orders and judgment of the court made in said divorce case were void, for the following reasons, that—

> "Said C. C. Pennington, during the pendency of said suit was not a resident of the state of Ohio, and defendant knew, or ought to have known that fact.
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> "The return of summons by the sheriff in said cause showed that said C. C. Pennington was 'not found in said county.'
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> "An affidavit for service by publication was then made in said cause, which stated that the residence of C. C. Pennington 'was unknown and that service could not be had within the state of Ohio.'

"The publication of notice and proof thereof in said cause stated his 'place of residence was unknown.'

"This plaintiff at no time submitted to the jurisdiction of the court in said cause.

"No summons was served upon him in said action, nor did he appear in said action voluntarily, or otherwise.

"The court in said cause had no jurisdiction either of the person or property of this plaintoff, and hence could not render a valid judgment or make any valid orders against this plaintiff or order said bank to pay said money to any one but its owner, C. C. Pennington.

"Plaintiff says that the payment of his money by the bank without his authority to others than this plaintiff was illegal and without authority of law, and thereby plaintiff has been deprived of his property without due process of law in violation of the Constitution of the United States, and particularly of Section 1, Article XIV, thereof."

To this amended reply, said bank filed a demurrer (Record, page 6), on the ground that it was insufficient in law.

Thus the facts as set forth in the pleadings, and as substantially stated above, are admitted by all parties.

The Superior Court sustained said demurrer; the Circuit Court affirmed the judgment of the Superior Court.

The Supreme Court of Ohio affirmed the judgment of the Circuit Court without report (Record, page 16), upon the authority of *Benner* v. *Benner*, 63 O. S., 220, and *The Cleveland & Buffalo Transit Co.* v. *Beeman*, 81 O. S., 509 (unreported).

The plaintiff in error is asking for a reversal of the judgments of the Superior Court, the Circuit Court and the Supreme Court of the State of Ohio.

SPECIFICATION OF ERROR.

The error relied upon is the affirmation by the Supreme Court of the State of Ohio of the judgment of the lower courts sustaining the demurrer to the amended reply whereby such court held that a decree of the Court of Common Pleas of Hamilton County, Ohio, in a suit for divorce and alimony, against a defendant non-resident of the State, upon whom there was no personal service of summons and who did not enter his appearance in person nor by attorney, which ordered the bank wherein said defendant had a deposit to his personal credit to pay the defendant's money to the wife on account of alimony and attorney's fees, was valid.

Plaintiff in error claimed that such decree or order of court was without validity, and The Fourth National Bank (defendant in error) was not thereby justified in paying the money or credit of the husband on deposit to the wife, for such judicial proceeding was in violation of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deprive any person of property without due process of law.

THE LAW.

I.

Suit for Alimony is Strictly a Proceeding in Personam.

If a plaintiff seeks to assert some interest in land or other tangible property as against a non-resident defendant he may proceed directly against the land.

Or if he seeks to establish a debt he can by attachment bring the property (tangible property) of defendant under the control of the court, to respond to the debt, unless the defendant puts in an appearance and disproves the debt.

But the right must exist or be claimed to exist, before attachment can be had. The defendant must be, or must be alleged to be indebted to plaintiff, for only on the ground of satisfying an existing debt can plaintiff cause defendant's property to be seized.

> "If there is no appearance of the defendant and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." *Pennoyer* v. *Neff*, 95 U. S., 725.
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> "Service of process by publication * * * where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*."
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> *Pennoyer* v. *Neff*, 95 U. S., 733.

In *Minor on Conflict of Laws*, page 191, Section 88, we find the statement—

> "But a decree for the costs of a divorce suit, or a decree for alimony, is a decree strictly *in personam*, since the object is to fasten upon the defendant a general pecuniary liability, not to affect the status."

"The obligation of a husband to support his wife is personal and therefore a decree of alimony against a non-resident defendant is *in personam* and void, unless he has appeared, either in person or by attorney, or has been personally served with process within the territorial jurisdiction of the court."

14 Cyc., 745.

"A decree in divorce is *in rem* and, therefore, justified by jurisdiction over the *res* alone, only in so far as it affects the marital status. If it goes further than this, and assumes to adjudicate matters collateral or incidental to the dissolution of the marriage, the proceeding becomes one *in personam*, and no personal liability can be imposed upon the defendant unless there is jurisdiction of his person acquired by proper service of process. All the cases which recognize the jurisdiction of the state to determine the marital status of its own citizens, although one of the parties lives in another state, limit the exercise of it to the dissolution of the marriage. The decree in such cases affects only the status of the marriage relation.

"On the same principle, when the defendant in divorce, is a non-resident and is not personally served with the process within the state, or has not voluntarily submitted himself to the jurisdiction of the court, a decree awarding alimony has no extra-territorial validity, for, to that extent, it is purely a personal judgment."

2 *Bishop on Marriage and Divorce*, Section 9.

"That the decree in the divorce suit, in so far as it purported to be a personal decree against the defendant for alimony and costs, is void, can admit of no doubt. In the absence of per-

sonal service upon the defendant within the jurisdiction of the court, no court has power to render a judgment *in personam* which can be the subject of an action or the basis of an execution. To render a valid judgment, a court must obtain jurisdiction either of the person or property of the defendant within its jurisdiction."

Bunnell v. *Bunnell*, 25 Fed. Rep., 216.

"Alimony—It exists only by judicial decree. Therefore, by all opinions, it can not be validly awarded in a mere ex parte divorce suit *in rem*, where the non-appearing defendant's domicile is in another state. If he dwells in the same state, a statute may, according to the Indiana case, authorize a decree for alimony against him on constructive notice. If in another state it can not, except when he appears and submits to the jurisdiction, then it can."

2 Bishop on Marriage, D. & S., Section 9.

This principle is elementary and has never been disputed.

The judgment for alimony and costs against the non-resident defendant being utterly void, no order of the court to carry such judgment into effect is of the least force.

The Supreme Court of Ohio in affirming the decision of the lower courts, held that the decree of the trial court which divested the defendant in a suit for divorce and alimony of all title to the deposit credit which he had in the bank and ordered the bank to pay over the amount of the deposit to the plaintiff on account of alimony was valid, although no attempt had been made to attach or garnishee said money or credit nor in any way to subject it to the jurisdiction of the court. The only order con-

cerning such credit was one restraining the bank from paying money to the defendant, which was, we claim, without validity and moreover purported to be operative only in case a personal judgment for alimony should be obtained, but no such judgment was ever obtained.

The Supreme Court of Ohio decided the case upon the authority of *Benner* v. *Benner*, 63 O. S., 224.

This case and one other, *Wesner* v. *O'Brien*, 56 Kans., 724 ,contrary to the current of authority, hold that under certain statutes the court may allow lands situated in the state to be appropriated to the support of the wife, in the nature of alimony.

These two cases do not for a moment question the proposition that a decree for alimony is without effect against a non-resident, that no personal judgment can be rendered without service; on the contrary, the court says in *Benner* v. *Benner*, 63 O. S., 220, on page 226:

> "The plaintiff in her action below, did not seek, nor obtain, a personal judgment against the defendant. She and her child were residents of the county in which her suit was brought. The specific property she asked to have subjected to her support was situated in that county, and she sought no other relief than its appropriation, or such part of it as might be necessary for that purpose, in fulfillment of the defendant's obligation to her in that behalf. The action and judgment were substantially *in rem*, in the sense that their direct object was to reach and dispose of property within the jurisdiction of the court."

Also, page 224:

> "If the action below was merely one *in personam*, the judgment can not be maintained;

> for, in such an action the court could acquire no jurisdiction to render judgment without personal service on the defendant, or appearance by him in the action. But if it may properly be regarded as an action *in rem*, the court could undoubtedly obtain jurisdiction, by constructive service, to appropriate the property of the defendant, situated in the county where the action was brought, to the purposes of the action, though it could render no personal judgment on which a general execution could issue, or an action against him be maintained."

These two cases do hold however, that under certain conditions the land of the defendant may be brought within the control of the court in what may be called substantially a proceeding *in rem*, by action under the statutes for the appropriation of a non-reident's property. To accomplish this, the land must be specifically described in the petition and other provisions followed, and this upon the ground mainly that the wife has an inchoate right of dower in the land, "which possessed the element of property to such a degree that she could maintain an action during the life of her husband for its protection and for relief from fraudulent alienation by her husband." *Wesner* v. *O'Brien*, 56 Kans., 728.

We can see how the court might view a porceeding to appropriate some specific real estate within its jurisdiction to the support of the wife in lieu of alimony, as in the nature of a proceeding *in rem*, although the weight of authority is so overwhelmingly the other way.

But how does this affect the case at bar? The Benner case holds that if the wife had sought to obtain a personal judgment for alimony such judgment would have been void.

By no loose definition of a proceeding *in rem*, can money, much less a bank credit, be made the subject of such proceeding. Before having a proceeding *in rem*, you must have some definite *res*, the status of which it is sought to establish.

The Supreme Court of Ohio held this most clearly in *Cross* v. *Armstrong*, 44 O. S., 613, in which case it was held that money can not be a *res*, even where it was paid into court under an interpleader.

The money is, to be sure, the thing contended for, but the action is to determine the rights of parties, not the *status* of the particular money. There is no particular money, even if it is wrapped up and marked. The controversy does not concern the status of that money *in specie;* any other money will do as well.

We ask the court to read from the beginning of the last paragraph on page 623 to the end of first paragraph, page 626 (44 O. S.), and it will appear most clearly that this money (not even money only a bank credit) lying in the Fourth National Bank could not possibly be made the subject of a proceeding *in rem*, and how the case of *Benner* v. *Benner*, 63 O. S., 220, which holds (against weight of authority) that land may be subjected to appropriation for or rather in lieu of alimony, without personal service on a non-resident, does not for one moment suggest that anything but land can be dealt with in a proceeding in the nature of a proceeding *in rem*.

But in the case at bar, there was not even any attempt made to seize or appropriate this money or credit; but entire reliance was placed upon the proceeding strictly *in personam* against the defendant, who was not served and did not appear.

When alimony is prayed for, as in the case of *Pennington* v. *Pennington* (which was not done in the Benner case),

the action becomes *in personam*, and unless jurisdiction is obtained of the person of the defendant, neither he nor his property can be affected by such decree.

A proceeding *in personam* without personal service is a self-contradictory phrase.

II.

A Proceeding Quasi in Rem, Such as Attachment, Can be Employed Only as a Process to Compel the Payment of a Debt.

In the case at bar there was no proceeding *in rem*, for there was no attempted appropriation of specific property of defendant. There was no proceeding *quasi in rem* for there was no debt alleged, no atachment issued. The only order of the court was an injunction restraining the bank from paying to the defendant the amount of money due him. The only process was an attempt to make the bank hold the money until a debt could be established, *i. e.*, until alimony could be decreed, but as no personal service upon defendant was ever obtained; alimony could be not decreed. If the court could restrain payment of the money until the debt should be established, it could not direct the payment of that money in satisfaction of a debt which never came into existence.

Joseph Henry Beale in an able article in 27 Harvard Law Review, page 107, considers the distinction between proceedings *in rem*, *quasi in rem* and attachment or garnishment, where the principal defendant is without the jurisdiction.

He says, page 118:

> "In short, the original conception of garnishment as a proceeding based on jurisdiction *in rem* over a thing has been superseded by a conception of garnishment as a transitory personal action against the garnishee."

Much less can an injunction against the bank restraining the disposition of a bank credit partake of the nature of a proceeding *in rem*.

III.

There Can be no Proceeding in Rem Against a Bank Credit.

Mr. Beale says:

> "The jurisdiction *in rem* depends upon control of the thing at the time the litigation is begun" (p. 108) * * * "Since the jurisdiction is in reality a jurisdiction over the thing and since therefore no judgment against the person that he owes a debt may effectually be granted, the proceeding must in some way be brought against the thing and not against the person." (p. 109.)
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> "The true doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere. * * * In order to control the relation the court must have the power to control both parties to it." (p. 115.)
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> "The notion that garnishment is an ordinary action against the garnishee in combination with another personal action, and action against the principal debtor, has led the courts gradually to decide that garnishment proceedings

> will lie in any place in which personal jurisdiction may be obtained over the garnishee." (p. 118.)

The service of the bank with an injunction was not even a garnishment, but it was nearer a garnishment than anything else in the nature of an attempt to appropriate specific property.

In *Benner* v. *Benner*, 63 O. S., 220, the court held that the real estate of the defendant could be subjected to the wife's right of support, first, because the specific piece of real estate was described in the petition and its appropriation prayed for, *i. e.*, the proceeding was *in rem;* and second, that there was a seizure of the specific property which brought it within the control of the court.

In the case at bar, there is no real estate, there is no tangible property, there is only a chose in action which has no situs and can therefore not be within the jurisdiction. The proceeding does not even purport to be *in rem*, nor even *quasi in rem*, such as attachment. Nor yet again is a garnishment attempted.

Pennington, a non-resident of the State of Ohio is sued by his wife for divorce and alimony. He was not personally served with summons, and he did not personally nor by attorney enter his appearance in said suit. A decree of divorce could be granted. A judgment for alimony could not be rendered. When the court decreed that the bank should pay the money of Pennington it held on deposit subject to his check, to his wife on account of alimony, such portion of the decree was void.

> "Since the adption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a Court of justice

to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due procees of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

Pennoyer v. *Neff*, 95 U. S., 714-733.

Respectfully submitted,

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GUY W. MALLON,

Of Counsel.